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# Supreme Court of the United States

OCTOBER TERM, 1965

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THE CROWN LIFE INSURANCE COMPANY, a Canadian corporation, *Petitioner*,

*v.*

ALICIA VARAS, *Respondent*.

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*ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA*

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## REPLY BRIEF FOR PETITIONER

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September 16, 1965

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## REPLY BRIEF FOR PETITIONER

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It is of crucial importance to the international insurance industry that the serious issues of constitutional and international law raised by this case be recognized and passed upon by this Court. If the courts of any state of the United States are permitted to alter the obligations of foreign insurance companies on their policies issued abroad to foreigners, merely because the insurance company is subject to suit in that state, and without any arguable overriding governmental interest on the part of the state in question, the resultant violation of constitutional and interna-

tional law would introduce serious uncertainties in an important industry particularly affected with a public interest and have a serious impact upon the foreign policy interests of the United States.* Some of the possible consequences of such court action are summarized in a Note of the Government of Canada filed in this Court through the courtesy of the Solicitor General and reproduced as an appendix to this brief.

Respondent's brief only repeats the contract and conflict of laws theories by which the Pennsylvania court sought to engraft Pennsylvania law on a Cuban contract without facing the constitutional and international law issues raised by the decision. Every significant factual contact in this transaction is with Cuba; none with Pennsylvania. The principles of constitutional and international law involved depend upon significant factual contacts. They cannot be evaded under the guise of applying a so-called state conflict of laws rule.** These principles of constitutional and international law are necessary and wholesome limita-

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* The refugees from Castro's Cuba deserve not only our sympathy but material help. This has been and is being provided through appropriate federal, state and municipal agencies. It is not appropriate for the courts to torture the law to provide additional relief by awarding recovery on risks (such as currency depreciation) not insured against. To maintain a healthy insurance industry at the lowest possible cost to the policyholders the courts must resist the temptation to rewrite the law or the contract to fit individual hardship cases. *Cf.* Maryland for the use of Levin v. United States, 381 U.S. 41, 53.

** "[A] state cannot obtain control over conduct not within its jurisdiction to prescribe by the simple device of inventing a choice of law rule to be applied in the particular case for the purpose of giving effect to a rule of its own law designed to govern conduct." Restatement, *The Foreign Relations Law of the United States* § 19, comment d (Prop. Off. Draft 1962).

tions on the authority of a forum to substitute its own law for that governing a foreign transaction.

The Pennsylvania court was dealing with an alleged breach of a contract contained in a policy of life insurance entered into in Cuba in Spanish between Respondent, a citizen and resident of Cuba, and Petitioner, a Canadian corporation with an office in Cuba. Under the laws of Cuba Respondent is entitled to the cash surrender value of her policy in pesos in Cuba. Petitioner at all times has been ready, willing and able to perform the contract. Under Cuban law there has been no breach. See *Confederation Life Ass'n* v. *Ugalde,* 164 So.2d 1 (Fla. 1964), *cert. denied,* 379 U.S. 915; *Crown Life Ins. Co.* v. *Calvo,* 164 So.2d 813 (Fla. 1964), *cert. denied,* 379 U.S. 915.

Personal jurisdiction was obtained over Petitioner for no reason other than that it writes insurance in Pennsylvania. The Pennsylvania court has conjured up a new obligation to pay dollars in Pennsylvania notwithstanding the lack of any contact with Pennsylvania beyond the making of demand for payment through a Pennsylvania attorney and the bringing of suit in Pennsylvania.* Such contacts are patently in-

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* As recently as the 10th of June of this year the United States Court of Appeals for the District of Columbia Circuit had before it for decision the question whether by bringing suit in the District of Columbia a Maryland resident's claim arising out of a Brazilian accident could be decided under the substantive law of the District of Columbia. The court stated:

> "... the only relationship of the District of Columbia to this claim is that it provides a forum with jurisdiction over the appellee. That is hardly a reason for the forum to prefer its own notions of policy to those embodied in the Brazilian law which created the claim appellant is asserting." Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense, No. 18,277, D.C. Cir., June 10, 1965, p. 18.

sufficient to satisfy the applicable constitutional and international law norms. In denying Petitioner a substantive defense under the law governing its contract the Pennsylvania court has deprived Petitioner of property in violation of the Fourteenth Amendment.

I. *The fact that there was no federal question involved in* Calvo v. Crown Life *is no indication that a federal question is not involved here.*

Respondent attaches importance to the fact that Petitioner was a party in *Crown Life* v. *Calvo, supra,* and in that case opposed certiorari on the ground that no federal question was there involved. The fact that no federal question was there involved is no indication that a federal question is not involved here, for there the Florida Supreme Court applied the Cuban law that governed the contract and here the Pennsylvania court has denied Petitioner its rights under Cuban law.

Respondent intimates that the policy in the *Calvo* case expressly required payment in Cuba. (Br. in Opp., p. 14.) This is not correct. The policy was silent as to the place of payment in the *Calvo* case, exactly as it is in this case. Under neither policy is payment required to be made outside of Cuba.

The Cuban legal tender statutes were amended after Respondent's policy was issued. The amended statutes withdrew for all contracts demandable (*"exigible"*) in Cuba the legal tender force of the dollar. Under the amended statutes Petitioner had to accept premium payments tendered in pesos,—at one peso to the dollar; and Respondent has to accept benefits in pesos at the same rate. Subsequent statutes forbid payment in any medium other than pesos.

The Pennsylvania courts in giving judgment for dollars in the United States on an obligation to pay

pesos, which Petitioner stands ready, willing and able to perform, are taking property without due process of law.

II. *The cases awarding payment in dollars in the United States were on policies which expressly required payment of premiums and benefits outside of Cuba. The Cuban legal tender statutes did not apply to them.*

Respondent seeks to associate this case with the *Lorido* and other cases involving policies of insurance that expressly required payment of premiums and benefits in one or another state of the United States.* (Br. in Opp., p. 17.) The argument overlooks the fact that the policies of the Lorido type were not demandable in Cuba. Respondent had the right under her policy, as Calvo had under his policy, to make payment of premiums and to demand payment of benefits in Cuba. Unlike the Lorido type of contract, the Calvo and Varas contracts came within the amended Cuban legal tender statutes.

Appended to Respondent's brief is a copy of the memorandum for the United States submitted by the Solicitor General in the *Lorido* case. Observing that the Solicitor General found no substantial question of federal law in the decision of the lower court in *Lorido*, Respondent suggests that there must be none in this case. (Br. in Opp., pp. 9, 15.)

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* Pan-American Life Ins. Co. v. Lorido, 154 So.2d 200 (Fla. 1963), *cert. denied*, 377 U.S. 990; Pan-American Life Ins. Co. v. Recio, 154 So.2d 197 (Fla. 1963), *cert. denied*, 377 U.S. 990; Pan-American Life Ins. Co. v. Raij, 156 So.2d 785 (Fla. 1963), *cert. denied*, 379 U.S. 920; Pan-American Life Ins. Co. v. Botana, 163 So.2d 767 (Fla. 1964), *cert. denied*, 380 U.S. 943; Ajuria v. Pan-American Life Ins. Co., 161 So.2d 70 (La. 1964), *cert. denied*, 377 U.S. 997.

The issues of constitutional and international law now raised were not germane in *Lorido*. As the Solicitor General was at pains to point out, the Lorido policy was expressly payable in Louisiana. Not being demandable (*"exigible"*) in Cuba, the Cuban legal tender statutes were inapplicable. (See Br. in Opp., pp. 22-25.)

III. *Respondent's contract and conflict of laws arguments (apart from their intrinsic invalidity) do not meet Petitioner's constitutional and international law points. Constitutional and international law require that the jurisdiction whose laws are applied to govern a transaction have factual contacts with that transaction that are significant.*

Respondent has not pointed to any significant factual contacts of Respondent's contract with Pennsylvania. Instead, the application of Pennsylvania law is invoked by way of extensive discussion of novel (not to say erroneous) contract and conflict of laws theories. Notwithstanding the disregard of the constitutional and international law principles involved it may be useful to analyze these theories, extraneous as they are.

The basic theory of Respondent and of the court below seems to be that the cash surrender provision constituted, in legal contemplation, an option, *i.e.*, "a continuing, irrevocable offer," which was accepted by Respondent in Pennsylvania. The cash surrender provision of the policy is, of course, not an offer but is one of several alternative benefits available to Respondent under the single contract of insurance. The policy did not contemplate that the parties would enter into a second contract when the cash surrender alternative was chosen. No new consideration or new promises were required or involved. See *Aetna Life Ins. Co.* v.

*Dunken,* 266 U.S. 389, 399-400. However, even if Respondent is taken to have bargained for and obtained, in addition to insurance benefits, an option in some technical sense, which by her acceptance would ripen into a second contract for the cash surrender value, it is elementary that the terms of the offer contained in the option are defined by the option instrument itself. Respondent's "acceptance" may not enlarge the scope of the "offer." See Restatement, *Contracts* §§ 59-60 (1932). Thus, even if we accept the assumptions of Respondent's novel approach, we may not disregard the scope under governing law of the "offer"* which under the "second contract" theory was accepted.

Respondent's counsel apparently are not themselves persuaded by the option or "second contract" theory. They shift to talking about Pennsylvania, not as the place of contracting, but rather as the "place of performance." (Br. in Opp., pp. 11-14.) This latter approach to the conflicts problem is not only round about; it is circular. It assumes the very point in issue. It assumes that Petitioner's obligation is defined by the

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* The offer so called was a provision in a contract which was wholly connected with Cuba, was obviously made with reference to Cuban law and was, under any proper conflicts approach, governed by the substantive law of Cuba. Even the choice of dollars as the medium of payment was related to Cuba, as the dollar then was legal tender in Cuba by force of the laws of Cuba. If the parties had desired to insulate the contract from alteration by operation of the laws of Cuba they could have stipulated, as the parties did in the *Lorido* line of cases, that premiums and benefits be paid only outside of Cuba. Being subject to Cuban laws the contract became a peso contract under changes in the Cuban legal tender legislation. This was accomplished by statutes comparable to our own Gold Clause legislation. See Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240. These laws effectively modified every contract on which demand could be made in Cuba.

law of whichever place Respondent chooses to demand performance.*

IV. *Contrary to Respondent's assertion, Petitioner's counsel did not seek to exclude testimony as to any possible contact with Pennsylvania. Respondent's cryptic suggestion of waiver is without foundation.*

Contrary to Respondent's assertion (Br. in Opp., pp. 4-5), Petitioner's counsel did not seek to exclude testimony by Respondent as to an alleged intention to reside in Pennsylvania or as to any possible contact with Pennsylvania. Respondent testified that she had

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* The circularity of this line of reasoning is obscured by extensive quotation from the Restatement, *Conflict of Laws* (1934). The impression sought to be given is that the Pennsylvania court had done nothing more than apply usual and accepted conflicts rules.

The most cursory examination of the Restatement shows that counsel's approach is erroneous even on its own terms. It is, of course, established conflicts doctrine that issues as to the nature and extent of a party's obligation, including "when, where and by whom the performance is to be made and exactly what act of performance a party is obligated by the contract to do" are issues determined by the law of the *place of contracting*. Restatement, *Conflict of Laws* § 346 (1934); see *id.* §§ 332, 347. The principle of the Restatement sections quoted by Respondent (§§ 355-359) has to do only with the effect of local law upon the manner and details of performance at a place different from the place of contracting; but "the law of the place of performance . . . is not applicable to the point where the substantial obligation of the parties is materially altered." *Id.* § 358, *comment b;* see *id.* § 355.

The draft of the second Restatement has gone even further in pointing out that only details of performance are to be governed by the law of the place of performance. All substantial matters of validity and effect are to be governed by the law of the state with which the contract has its most significant relationships. Restatement( Second), *Conflict of Laws* §§ 332, 346-346d (Tent. Draft No. 6, 1960). The state with which the Varas contract has its most significant relationships is Cuba. By no stretch of the imagination could that state be Pennsylvania.

considered residing with a relative in Pennsylvania but had abandoned such intention. No objection was made by Petitioner, and no further testimony was offered by Respondent on this point. (R. 218.)

It was made clear to Respondent's counsel from the outset that Petitioner contended, and would contend throughout the proceedings, that Cuban law governs the contract. (*E.g.*, R. 221). Respondent's cryptic suggestion of waiver is utterly without foundation.

V. *Respondent's efforts to ridicule the international law and foreign relations factors discussed in the Petition and in the Note of the Government of Canada leave unscathed the pertinent consideration that these are matters of very substantial and immediate federal concern.*

The international cases cited in the Petition lose none of their pertinence because drawn from a wide variety of factual situations. They all support the proposition that municipal courts are prohibited by international law no less than by constitutional law from being capricious in their choice of the law governing a foreign transaction.

Respectfully submitted,

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September 16, 1965